

# SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

(202) 371-7000  
Fax: (202) 393-5760  
<http://www.skadden.com>

DIRECT DIAL  
202-371-7017  
DIRECT FAX  
202-371-7989  
EMAIL ADDRESS  
KHONG@SKADDEN.COM

FIRM/AFFILIATE  
OFFICES  
BOSTON  
CHICAGO  
HOUSTON  
LOS ANGELES  
NEW YORK  
NEWARK  
PALO ALTO  
RESTON  
SAN FRANCISCO  
WILMINGTON  
BEIJING  
BRUSSELS  
FRANKFURT  
HONG KONG  
LONDON  
MOSCOW  
PARIS  
SINGAPORE  
SYDNEY  
TOKYO

May 27, 2003

## VIA E-MAIL & HAND-DELIVERY

Mai T. Dinh, Esq.  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

RE: Comments to Notice of Proposed Rulemaking and  
Request to Testify

Dear Ms. Dinh:

This provides comments on behalf of the New York City Host Committee 2004 (the "NYC Host Committee") on the Federal Election Commission's ("FEC's" or "Commission's") Notice of Proposed Rulemaking ("NOPR"), which was published on April 15, 2003. We also request an opportunity to testify before the Commission regarding these comments. The NYC Host Committee is a non-profit charitable organization exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code and is the host committee for the 2004 Republican Presidential nominating convention, which will be held in the City of New York. The NOPR, among other things, (1) requests comments as to whether new rules should be issued prohibiting the acceptance of soft money contributions (i.e., corporate contributions or individual or PAC contributions in

Mai T. Dinh, Esq.

May 27, 2003

Page 2

excess of federal limits) by host committees, and (2) proposes rules further circumscribing the types of expenditures that may be made by host committees.<sup>1</sup>

Neither of these proposed rules should be issued. Rather, with the exception of the following, the rules governing host committees should not be changed. We agree with the Commission's proposal to eliminate the provision in the rules requiring that only persons having a local presence in the host city be permitted to contribute to host committees. Finally, although not addressed in the NOPR, the Commission should revisit its practice of automatically auditing host committees. The Federal Election Campaign Act of 1971, as amended, ("FECA") does not give the Commission the authority to audit host committees unless it is for cause.

#### **I. Background on the NYC Host Committee**

As described above, the NYC Host Committee is a charity that is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. No director, officer or employee of the NYC Host Committee is a representative, agent or otherwise associated with a national party committee. Rather, the NYC Host Committee was created in June 2002 by the Mayor of the City of New York and others who wanted to attract a national party's Presidential nominating convention to the City of New York. Indeed, the sole purpose of the NYC Host Committee is to promote and draw commerce to the City by attracting the Republican and/or Democratic Presidential nominating conventions to the City, and if selected, providing services related to that convention.

To this end, the NYC Host Committee submitted a bid proposal to both the Republican National Committee ("RNC") and the Democratic National Committees ("DNC") asking them to select New York City as the site for their 2004 conventions. The NYC Host Committee was one of several host committees vying for these conventions. Indeed, there were also host committees representing the Cities of Boston, Tampa, and New Orleans. In January 2003, the RNC selected New York City for its convention, but the DNC did not select the City.

After being selected, the NYC Host Committee entered into an arms-length Site City Agreement with the RNC. The terms of this Agreement were heavily negotiated between the parties, even up to the day of its signing. Essentially, the NYC Host Committee agreed to provide certain services related to the convention in an effort to promote and draw commerce to the City of New York. In exchange, the RNC agreed to hold its 2004 convention in the City.

---

<sup>1</sup> Given that neither a national party nor a federal officeholder or candidate solicits contributions on behalf of the NYC Host Committee, we are not commenting on the Commission's proposal to restrict such solicitations.

**II. Host Committees Should Be Permitted to Continue Accepting Soft Money Contributions**

BCRA prohibits a national party committee, any "agent" acting on behalf of the national party, or any entity that is "established, financed, maintained, or controlled" by such national committee from accepting, spending or soliciting soft money (i.e., corporate contributions or individual or PAC contributions in excess of

federal limits). 2 U.S.C. § 441i(a). The Commission is requesting comments as to whether this provision mandates the issuance of new rules that prohibit host committees from accepting soft money. BCRA does not require the Commission to issue such new rules in that host committees are neither agents of nor established, financed, maintained, or controlled by a national party committee<sup>2</sup>.

**A. Host Committees Are Not Agents of a National Party Committee**

To qualify as an agent of a national party committee, a person must have "actual authority, either express or implied, to . . . solicit, direct or receive any contribution, donation, or transfer of funds" on behalf of the national party committee. 11 C.F.R. § 300.2(b)(1)(i). Host committees do not have such express or implied authority.

A host committee, such as the NYC Host Committee, is similar to a vendor that has entered into an arms-length agreement with a national party committee under which the host committee agrees to provide certain permissible convention-related services in exchange for the national party's commitment to hold its convention in the host city. The host committee receives the consideration of increasing the prominence of, and attracting commerce to, the host city as a result of the convention. In the case of the NYC Host Committee, the terms of its Site City Agreement with the RNC were heavily negotiated even up to the day of signing. Such agreement does not create an agency relationship, but at most an independent contractor relationship between the parties.

---

<sup>2</sup> Please note that even if host committees were agents of, or established, financed, maintained, or controlled by, a national party committee, which they are not, the District of Columbia District Court, in McConnell et al. v. FEC et al., recently struck down the ban on soft money, except when the funds are used by a national party to sponsor public communications that promote, support, attack or oppose a clearly identified federal candidate. Host committees do not sponsor or pay for such communications. Thus, under the McConnell v. FEC decision, BCRA would not prohibit soft money to host committees even if host committees were deemed to be a part of a national party committee. We note that this decision is pending appeal to the Supreme Court.

The Site City Agreement does not give the NYC Host Committee the authority to (and the NYC Host Committee does not as a practical matter) solicit, direct, or receive contributions or any funds on behalf of the RNC. Rather, the NYC Host Committee solicits donations on its own behalf so that it can pay for the services that it agreed to provide under the Site City Agreement. These solicitations are not made under the color of the RNC in that the solicitations are made by the

NYC Host Committee's own staff and consultants who are not related to the RNC. The RNC also does not control or otherwise participate in the NYC Host Committee's fundraising efforts. Moreover, the NYC Host Committee does not characterize its solicitations as being made by or on behalf of the RNC.

**B. Host Committees Are Not Established, Financed, Maintained, or Controlled By a National Party Committee**

Host committees, by their very nature, are not established, financed, maintained or controlled by a national party committee. Host committees are independently created, by those who have a vested interest in a particular city, to compete, along with other host committees representing other cities, to be selected by a national party to host its Presidential convention. A host committee's interests are also not aligned with a national party committee in that a host committee's sole purpose is the well-being of the host city. The only reason that a host committee bids for a convention is to promote, and attract commerce to, the host city -- similar to the way in which a city would attempt to host a Super Bowl game or the Olympics. The host committee attempts to perform its role in the most economical manner. In contrast, the sole purpose of a national party committee in holding its convention is to select a Presidential nominee and to successfully launch that nominee's candidacy for the general election.

This divergence in the interests of the host committee and the national party committee is born out in the Site City Agreement where the host committee essentially agrees to be a vendor by providing certain permissible services in exchange for the commercial benefit that accrues to the City as a result of the convention. Moreover, the divergent interests make it impossible for the national party to directly or indirectly control or otherwise govern a host committee.

The NYC Host Committee is a prime example of this in that it was created by the Mayor of the City of New York and others who wanted to attract a national party's Presidential nominating convention to the City of New York. The sole purpose of the NYC Host Committee is to promote and draw commerce to the City by attracting the Republican and/or Democratic Presidential nominating conventions to the City, and if selected, providing services related to that convention in an economical manner. To this end, the NYC Host Committee competed with

Mai T. Dinh, Esq.

May 27, 2003

Page 5

other host committees (including those from Boston, Tampa, and New Orleans) for both conventions before being selected by the RNC. The terms of the Site City Agreement between the NYC Host Committee and the RNC were heavily negotiated between the parties, even up to the day of its signing.

Moreover, the Commission has set forth various factors to apply when determining whether an entity is established, financed, maintained, or controlled by a national party committee. 11 C.F.R. § 300.2(c). Host committees, such as the NYC

Host Committee, do not satisfy any of those factors. Indeed, neither the individuals involved in creating the NYC Host Committee nor any director, officer, employee or consultant of the NYC Host Committee is a representative, agent or otherwise associated with the RNC. The RNC is also not involved in any way in the governance or operation of the NYC Host Committee and has no say in the appointment of NYC Host Committee directors, officers, employees or consultants. Finally, no funds are transferred between the RNC and the NYC Host Committee.

Please note that as a Section 501(c)(3) charity, the NYC Host Committee is prohibited under the Internal Revenue Code from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate. 26 C.F.R. § 1.501(c)(3)-1(d)(3). Indeed, the Internal Revenue Service ("IRS") grants this 501(c)(3) tax-exempt status to an organization only after it is convinced, after a thorough application process and factual inquiry, that the organization will not engage in any such political activity. The standard used by the IRS in applying this prohibition is much broader than the standard used by the FEC in that the IRS looks to any activity that influences, or is intended to influence, an election or results in a contribution to a political organization, such as a political party committee. See Treasury Reg. § 1.527-6(g); Technical Advice Memo. 9812001 (IRS, March 20, 1998); IRS Release No: IR-2001-93, pp 350-352. Thus, the fact that the NYC Host Committee successfully obtained Section 501(c)(3) tax-exempt status confirms that the NYC Host Committee and similar host committees are not acting as a surrogate for the RNC or as an organization whose purpose is to influence an election.

### **III. The Permissible Expenditures for Host Committees Should Not Be Further Circumscribed**

Commission rules currently list the types of expenses that may be paid for by a host committee. 11 C.F.R., § 9008.52(c). This list is exemplary in that it contains examples of permissible expenses and a catch all provision for "other similar convention-related facilities and services." *Id.* The Commission, however, proposes narrowing that list by eliminating the catch-all provision, and thereby making the list comprehensive rather than exemplary. The Commission also narrows the breadth of certain items on that list (e.g., limiting permissible local transportation only to transportation that is widely available to the delegates).

The Commission is apparently concerned that host committee activities benefit convention committees. However, this is not the relevant question. Rather, the question is whether a host committee is providing the services in question for the commercial purpose of promoting the City rather than for a political purpose. There is no doubt that everything that a host committee does (including providing a convention hall in which to conduct the convention) has the effect of directly or indirectly benefiting a convention committee by contributing to the success of the convention. However, by recognizing the permissibility of host committees, the

Commission correctly concluded that such benefits to the convention committee are merely incidental to the host committee's legitimate, commercially motivated efforts to promote the host city. The proposed narrowing of the permissible host committee expenditures artificially limits a host committee's ability to engage in such legitimate activities to promote commerce and good will of the host city.

**A. The List of Permissible Host Committee Expenditures  
Should Not Be a Comprehensive List**

By amending the host committee rules to set forth a comprehensive list of specific permissible host committee activities and not allowing any other activity, the Commission would be prohibiting a large variety of otherwise legitimate promotional activities that it did not have an opportunity to contemplate and incorporate into the rule. Indeed, it would be unreasonable for the Commission to attempt to anticipate in advance every form of legitimate promotional activity in which a host committee may engage on behalf of the host city. For example, the proposed list of permissible host committee activities does not include, and thus it would appear to prohibit, a host committee from providing something as simple as special trash pick-up near and around the convention area. This is not all in that there are other numerous variations of legitimate promotional activities which a comprehensive list would fail to anticipate.

We also note that the Commission has traditionally permitted host committees to provide office facilities for convention committee staff as well as facilities for the media covering the convention. These expenses are not included in the proposed comprehensive list of permissible host committee activities and thus would be prohibited.

**B. The Scope of the Particular Permissible Host Committee  
Expenditures Should Not Be Narrowed**

These proposed changes are supposedly based on the decisions that the Commission made during the audit of the 1996 host committees. However, the changes do not accurately reflect the 1996 audit. For example, we understand that the 1996 host committees were permitted to pay for the office facilities and local

Mai T. Dinh, Esq.

May 27, 2003

Page 7

transportation of the convention committee's staff, which are not on the proposed rule's list of permissible activities. Moreover, the 1996 audit decisions were made taking into account the totality of the circumstances surrounding the 1996 expenditures as to whether the expenditures were made for the commercial purpose of promoting the host city rather than a political purpose. It would be a mistake to generalize from those fact-specific decisions.

For example, the Commission proposes limiting the permissible local transportation that a host committee may provide to those that are "widely available

to convention delegates and other individuals attending the convention." There may be, however, local transportation that a host committee may want to provide that is not widely available but that is still part of a legitimate commercial effort to promote the city. For example, if an individual who is important to city commerce (e.g., someone who may be investing in city businesses or opening a facility in the city) or to the city's image (e.g., an important public figure) wants to attend the convention or participate in convention festivities, the host committee should be able to provide that individual with local transportation. Moreover, this proposed change is confusing in that it is unclear as to what is meant by "widely available."

As for hotel rooms, the Commission proposes that host committees be permitted to provide such rooms only at the rate paid by the host committee. In short, a host committee under this proposal may not provide hotel rooms for free if it has to pay for the rooms. This is antithetical to the basic idea that the host committee is the one providing the rooms. Indeed, the host committee is not providing the rooms if it is merely passing on the cost of the rooms. The Commission should determine either that hotel rooms may be used to commercially promote the city and thus host committees may provide the rooms for free or that the rooms are not used to promote the city and thus they should be prohibited altogether. There is no basis for the Commission's proposal that the host committee merely pass along the cost. Hotel rooms are important to a host committee's effort to commercially promote the host city. Indeed, good accommodations are necessary in order for a visitor to have an overall favorable opinion of his or her visit to the city. Providing hotel rooms is similar to a host committee sponsoring welcoming activities, which the Commission clearly agrees is permissible. Thus, a host committee's ability to provide hotel rooms should not be changed.

The other changes that the Commission proposes, including listing the expenditures that a host committee may not pay for, are also unfounded. They create general categories of do's and don'ts without taking into consideration the circumstances surrounding those expenditures which, for the most part, indicate whether the expenditures were made for the commercial purpose of promoting the city or for a political purpose.

**C. The Limitations on Host Committee Activities Should Reflect The Standard in McConnell v. FEC**

Notwithstanding the above, the District of Columbia District Court, in McConnell et al. v. FEC et al., recently limited BCRA's ban on soft money contributions to national parties only to those funds used to sponsor public communications that promote, support, attack or oppose a clearly identified federal candidate. Thus, under this decision, the Commission should restrict a host committee's activities only to the extent they involve public communications that promote, support, attack or oppose a clearly identified federal candidate.

**IV. Any New Rule Further Restricting Host Committee Activities Should Not Go Into Effect Until After the 2004 Elections**

Even if the proposed rule changes above were warranted, which they are not, the host committees are well into their fundraising drives and have already entered into agreements and made arrangements to provide certain services related to the 2004 Presidential nomination conventions. Changing the host committee rules at this stage would raise serious notice problems. Thus, any changes that the Commission may make to further restrict host committee activities should, at the very least, not go into effect until after the 2004 elections.

Please note that the Commission has the authority and the discretion to set the effective date of its rulemaking in this manner. Indeed, although BCRA sets forth a schedule for issuing rules to implement its terms, BCRA does not mandate that the rules have a particular effective date. Moreover, as discussed above, the Commission's proposed changes to the host committee rules are not required under BCRA.

Even if BCRA were to require the Commission to issue these rules and to make them immediately effective, which BCRA does not, the Commission would still have the discretion to postpone the effective date of the rules until after the 2004 elections. Indeed, the Supreme Court has recognized that the Commission, as the chief administrator and enforcer of FECA, possesses "extensive rulemaking and adjudicative powers" and thus is "precisely the type of agency to which deference should presumptively be afforded." Buckley v. Valeo, 424 U.S. 1, 109-10 (1976); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981).

This discretion includes the ability of the Commission to set an effective date for its rulemaking so that there is no notice problem (e.g., unfair surprise) on the part of the regulated entities. For example, in Sweet v. Sheahan, a federal statute (the Lead-Based Paint Act) expressly required the Environmental Protection Agency ("EPA") and the Department of Housing and Urban Development ("HUD") to issue rules and to make them effective by a certain date. 235 F.3d 80



(2d Cir. 2000). The Court, however, permitted the EPA and HUD to designate an effective date for the rules that was beyond the date mandated by the statute. In doing so, the Court recognized the agencies' discretion to establish an effective date based on the agencies' belief that "the rule's effective implementation require[d] an informed and prepared general public and regulated community" and that the extra time was necessary to avoid unfair surprise. *See Id.*, at 85, 86 (FN 10). If the agencies in the *Sweet* case had the discretion to postpone the effective date of their rulemaking, the Commission surely has such discretion here given that BCRA does not even mandate an effective date for the Commission's rules.

**V. The Local Presence Requirement for Contributors to Host Committees Should Be Eliminated**

Under current FEC rules, a person may contribute to a host committee only if that person (1) resides within the host city's metropolitan area; (2) is a local business (*i.e.*, has an office or facility located within the host city's metropolitan area); or (3) works for such local business. The boundaries of the metropolitan area are determined by the Commission for each host city. We agree with the Commission's proposal to eliminate this local presence requirement and to permit persons to contribute to host committees regardless of their physical location.

The purpose underlying this local presence requirement is to ensure that only persons who have a commercial interest in promoting the host city be permitted to contribute to the host committee. However, having a physical presence in or near the host city is not the only indication, and in many cases is a poor indication, of such commercial interest. For example, a company that has plans on imminently moving its headquarters to the host city has much more of a commercial interest in the city than a company that has a satellite office in the host city with one or two employees. Under the local presence requirement, the former is prohibited from contributing to the host committee while the latter may contribute an unlimited amount. Moreover, some companies may extensively sell products in the host city but not be permitted to contribute merely because it does not maintain an office there.<sup>3</sup> It is also impracticable and unrealistic to draw boundaries defining the host city's metropolitan area in that those boundaries, for the most part, are arbitrary as they relate to identifying those with a commercial interest in the city. Moreover, the local presence requirement as it applies to individuals is particularly unfair.

<sup>3</sup> We note that 11 C.F.R. 9008-52(c)(2) provides that businesses without a local physical presence may give to a host committee if it overrides a presumption of impermissibility by showing that the volume of business outside of the metropolitan area would be affected by the Convention. However, this would not permit the businesses in the above examples to contribute. Moreover, it is unclear as to what level of showing is required to override the presumption.

Mai T. Dinh, Esq.

May 27, 2003

Page 10

Individuals may want to contribute personal funds because of commercial interests in a City but may not live or work in that jurisdiction.

More importantly, whether a contributor to a host committee has a commercial interest in the host city is not relevant. Rather, as described above, the relevant question is whether the host committee is using its funds for the commercial purpose of promoting the host committee. The motive of the contributors to the host committee should not matter in that they are not involved in the ultimate use of their funds.

Finally, under the McConnell v. FEC decision, national party committees as well as Section 501(c) non-profit organizations, such as host committees, may accept soft money contributions regardless of where the donor is

physically located. Indeed, this decision permits the ban on soft money contributions only if the funds are used for a public communication (in the case of a national party) or a broadcast (in the case of a Section 501(c) non-profit organization) that promotes, supports, attacks or opposes a clearly identified federal candidate. Given that host committees do not engage in such broadcast activities, they should be permitted to accept soft money contributions regardless of where the donor is located.

#### **VI. The Commission Should Not Automatically Audit Host Committees**

Commission rules currently provide for the automatic audit of host committees. 11 C.F.R. § 9008.54. The Commission, however, does not have the statutory authority under FECA to conduct such automatic audits. In particular, FECA gives the Commission the authority to conduct automatic audits of only presidential and vice-presidential candidate committees and national party committees that receive public funding. 2 U.S.C. §§ 9007(a), 9038(a). Nowhere in FECA does it authorize the Commission to automatically audit host committees. Indeed, as described above, host committees are not a part of, nor even established, maintained, financed, or controlled by, a national party committee or a presidential campaign. The automatic audit provisions are also geared toward ensuring that public funds are spent properly and causing a repayment if they are not spent properly. In the case of host committees, there is no public funding and no repayment issues.

Please note that 2 U.S.C. § 438(b) permits the Commission to audit political committees. However, that provision permits an audit only for cause (i.e., where at least four Commissioners vote that the political committee has not met certain threshold requirement for substantial compliance with FECA) and does not authorize automatic audits. Moreover, host committees do not qualify as political committees that are subject to this auditing provision.

Given the Commission's lack of authority to automatically audit host committees, it should repeal 11 C.F.R. § 9008.54.

**VII. Conclusion**

For the foregoing reasons, we urge the Commission not to change its rules relating to host committees, except in the following areas: (1) the Commission should eliminate the local presence requirement for contributors to host committees; and (2) repeal the rule requiring the automatic audit of host committees.

Sincerely,

---

Kenneth A. Gross  
Skadden, Arps, Slate, Meagher & Flom  
LLP

---

Ki P. Hong  
Skadden, Arps, Slate, Meagher & Flom  
LLP

On behalf of New York City Host  
Committee 2004

**From:** "Andrew Weis" <ANWEIS@skadden.com>  
**To:** <pubfund2004@fec.gov>  
**Cc:** "Kenneth Gross" <KGROSS@skadden.com>; "Ki Hong" <KHONG@skadden.com>  
**Sent:** Friday, May 23, 2003 4:12 PM  
**Attach:** was1\_472657\_3.doc  
**Subject:** Comments to Notice of Proposed Rulemaking and Request to Testify  
 Ms. Dinh:

Please accepted the enclosed attachment, filed on behalf of the New York City Host Committee 2004, commenting on the Federal Election Commission's Notice of Proposed Rulemaking concerning public financing of presidential candidates and nominating conventions.

Please contact the following commenters should you have any questions or concerns:

Kenneth A. Gross  
 Director, New York City Host Committee 2004  
 c/o Skadden, Arps, Slate, Meagher & Flom LLP  
 1140 New York Avenue, N.W.  
 Washington, D.C. 20005-2111  
 (202) 371-7007  
 Email: [kgross@skadden.com](mailto:kgross@skadden.com)

Ki P. Hong  
 Skadden, Arps, Slate, Meagher & Flom LLP  
 1140 New York Avenue, N.W.  
 Washington, D.C. 20005-2111  
 (202) 371-7017  
 Email: [khong@skadden.com](mailto:khong@skadden.com)

Thank you for your consideration.

Sincerely,  
 Andrew E. Weis

\*\*\*\*\*

This e-mail and any attachments thereto, is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified any dissemination, distribution or copying of this email, and any attachments thereto, is strictly prohibited. If you receive this email in error please immediately notify me at (212) 735-3000 and permanently delete the original copy and any copy of any e-mail, and any printout thereof.

Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

\*\*\*\*\*